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SHIP ROSE.

LETTER FROM THE ASSISTANT CLERK OF THE COURT OF CLAIMS, TRANSMITTING A COPY OF THE CONCLUSIONS OF FACT AND LAW IN THE CASE OF CLAIMS (FRENCH SPOLIATION) RELATING TO SHIP ROSE AGAINST THE UNITED STATES.

JANUARY 6, 1902.—Referred to the Committee on Claims and ordered to be printed.

COURT OF CLAIMS,
Washington, D. C., December 30, 1901.

SIR: Pursuant to the order of the Court of Claims, I transmit herewith the conclusions of fact and of law and of the opinion of the court, filed under the act of January 20, 1885, in the French spoliation claims relating to the vessel, ship *Rose*, William Chase, master.

Respectfully,

JOHN RANDOLPH,
Assistant Clerk, Court of Claims.

Hon. DAVID B. HENDERSON,
Speaker of the House of Representatives.

[Court of Claims. French Spoliations. (Act of January 20, 1885; 23 Stat. L., 283. Decided April 2, 1901.) Ship *Rose*, William Chase, master.]

No. of Case.	Claimant.
120.	Lawrence H. H. Johnson, administrator of the estate of William Bartlett, deceased, *v.* The United States.
422.	Horace P. Noyes, administrator of the estate of Amos Pearson, deceased, *v.* The United States.
1056.	George L. Little, administrator of the estate of William Chase, deceased, *v.* The United States.
2720.	Lawrence H. H. Johnson, administrator of the estate of Edmund Bartlett, deceased, *v.* The United States.
2842.	Daniel J. Goss, administrator of the estate of John Whalen, deceased, *v.* The United States.
4318.	Franklin A. Wilson, administrator of the estate of John Pearson, jr., *v.* The United States.
4318.	Francis A. Jewett, administrator of the estate of James Prince, deceased, *v.* The United States.
4318.	James A. Titcomb, administrator of the estate of John Wells, deceased, *v.* The United States.
4318.	Amos Noyes, administator of the estate of Zebedee Cook, deceased, *v.* The United States.
3875.	Francis A. Jewett, administrator of the estate of James Prince, deceased, *v.* The United States.

No. of Case.	Claimant.
4484.	Joseph A. Titcomb, administrator of the estate of John Wells, deceased, *v.* The United States.
4320.	Franklin A. Wilson, administrator of the estate of John Pearson, deceased, *v.* The United States.
4320.	Arthur Kemble, administrator of the estate of Edmund Kimball, deceased, *v.* The United States.
4320.	Amos Noyes, administrator of the estate of Zebedee Cook, deceased, *v.* The United States.
4351.	Franklin A. Wilson, administrator of the estate of John Pearson, deceased, *v.* The United States.

PRELIMINARY STATEMENT.

These cases were tried before the Court of Claims on the 13th day of March, 1901.

The claimants were represented by John Paul Jones, Charles W. Clagett, Edward Lander, I. G. Kimball, Curtis, Pickett & Earle, and John W. Butterfield, esqs., and the United States, defendants, by the Attorney-General through his assistants in the Department of Justice, Charles W. Russell and John W. Trainer, esqs., with whom was Assistant Attorney-General Louis E. Pradt.

OPINION.

WELDON, J., delivered the opinion of the court:

The facts show that the ship *Rose*, William Chase, master, sailed on a commercial voyage from Newburyport, Mass., on the 20th of March, 1799, bound for Surinam, and thence sailed on the 23d of July, 1799, bound home to Newburyport.

While pursuing said last voyage she was captured on the high seas on the 31st of July, 1799, by the French cruiser *L'Egypt Conquise*, mounting 14 guns and 120 men; after an action of two and one-half hours, in which the master of the *Rose* lost 3 men killed and 14 wounded, and the French lost 25 killed and 21 wounded, the *Rose* was captured and taken into Guadeloupe, where, on the 6th day of August, 1799, the vessel and cargo were condemned by the tribunal of commerce, sitting at Basse Terre, Guadeloupe, under a decree in which it is alleged that "the captain of said ship was the bearer of a commission from the President of the United States, which authorized him to capture French armed vessels and carry them into any port of the United States, and that the captain of the vessel resisted until he was subdued by force of arms. In view of these facts the court makes reference to articles in justification of said preceedings." The findings establish the fact that the American ship resisted most vigorously the attempted right of search upon the part of the French ship, and we are to determine from that condition as an incident of the seizure whether such seizure and condemnation were illegal.

The legal effect of resisting search on the part of the American ship, when it was sought to be exercised on the part of the French ship, has not been determined by any adjudication of this court in the various cases tried under the act of Congress giving this court jurisdiction to determine the claims of American citizens for alleged spoliations committed by the French prior to the 1st day of July, 1801.

The nearest approach that the court has made to the subject of the right of search is in the case of the *Nancy* (27 C. Cls. R., p. 99). In that case the ship sailed from Baltimore in 1797; was captured by an English ship and sent to St. Nicholas Mole, and there the master was ordered not to depart without a convoy. She sailed under the escort of a privateer for Jerome and returned to the Mole under escort. On the return voyage the *Nancy* was captured by a French privateer. It is said in that case that "the question whether a neutral vessel laden with neutral cargo is liable to condemnation if captured under enemy convoy has never been directly determined; but on a review of the cases and elementary writers it is now held that if captured when actually and voluntarily under the protection of an enemy she is liable." Sailing under the convoy of an enemy is the exercise of the same power which is brought into requisition on the part of a neutral vessel when it resists the right of search by actual force.

If sailing under a convoy of an enemy of the belligerent is a just ground for seizure and condemnation, it must follow that resisting the exercise of search, as it was in this case, involves as serious consequences to the neutral vessel as where the right was denied by the presence and use of a convoy.

It is not necessary to multiply authorities to establish the right of search. It is said by Chancellor Kent (1 Kent's Commentaries, p. 155) that "in order to enforce the rights of belligerent nations against the delinquencies of neutrals, and to ascertain the real as well as the assumed character of all vessels on the high seas, the law

of nations arms them with the practical power of visitation and search. The duty of self-preservation gives to belligerent nations this right. It is founded upon necessity, and is strictly and exclusively a war right, and does not rightfully exist in time of peace unless conceded by treaty. All writers upon the law of nations, and the highest authorities, acknowledge the right in time of war as resting on sound principles of public jurisprudence and upon the institutes and practice of all great maritime powers." It is said by the same authority, page 154: "The whole doctrine was ably discussed in the English high court of admiralty in the case of the *Maria*, and it was adjudged that the right was incontestable, and that a neutral sovereign could not, by the interposition of force, vary that right."

In that case it is said of Sir William Scott, in stating the principles of international law upon the subject of search and of the right of a belligerent to search neutral vessels engaged in commerce on the high seas, "that the right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargo, whatever be the destination, is an incontestable right of lawfully commissioned cruisers of a belligerent nation. I say, be the ships, the cargoes, and destinations what they may, because till they are visited and searched it does not appear what the ships, the cargo, or the destinations are, and it is for the purpose of ascertaining these points that the necessity of this right of search exists."

Chancellor Kent, page 155, in further elaboration of the doctrine of the right of search, states the circumstances which might constitute an exception to that general rule, which makes it the duty of the neutral to subject itself to the jurisdiction of the belligerent in the exercise of the right of search. He says:

"There may be cases in which the master of a neutral ship may be authorized by the natural right of self-preservation to defend himself against extreme violence threatened by a cruiser grossly abusing his commission; but except in extreme cases a merchant vessel has no right to say for itself, and an armed vessel has no right to say for it, that it will not submit to visitation and search or be carried into an proximate port for judiciary inquiry."

The circumstances of this capture do not indicate that the condition cited by Chancellor Kent (which may be regarded as an exception to the general rule) existed in this case. While there might have been in the minds of the crew of the neutral vessel grave apprehensions of ultimate condemnation, even with reference to the legitimate defenses, that condition of apprehension upon the part of the resisting neutral did not justify him in denying the right of search to the belligerent. The circumstances of this case disclose a most vigorous assault and defense, there being twenty-four men killed and thirty-six wounded during the encounter between the respective vessels. This was actual resistance, and was only overcome by the most determined effort upon the part of the capturing vessel.

The right of search is so sacred in the view of international law that it is protected by enforcing the consequences of resistance where no actual resistance is made. As in the case of a convoy, it has been held by this court in the case of the *Nancy* (27 C. Cls. R., 99) that the presence of a convoy is constructive resistance and a denial of the right of search, which authorizes seizure and consequent condemnation.

It is most strenuously and ably argued by counsel that at the date of capture there was in existence the statute of June 25, 1798, entitled "An act to authorize the defense of merchant vessels of the United States against French depredations" (1 Stat. L., p. 522), and that by virtue of the provisions of that act the commander and crew of a vessel had a right to resist by all means in their power an attempt upon the part of a French commander and crew to search the American vessel. It is provided in that statute—

"That the commander and crew of any merchant vessel of the United States, owned wholly by a citizen or citizens thereof, may oppose and defend against any search, restraint, or seizure which shall be attempted upon such vessel or upon any other vessel owned, as aforesaid, by the commander or crew of any armed vessel sailing under French colors, or acting or pretending to act by or under the authority of the French Republic; and may repel by force any assault or hostility which shall be made or committed on the part of such French or pretended French vessel pursuing such attempt, and may subdue and capture the same; and may also retake any vessel owned as aforesaid which may have been captured by any vessel sailing under French colors, or acting or pretending to act by or under authority from the French Republic."

Whatever may be said as to the condition or status of the legal rights and obligations of the French and American Governments before the act of July 9, 1798, it must be assumed that after that period the principles and rules of international law determined and controlled the parties with reference to their rights on the high seas.

It is said, in the case of the *Nancy* (*supra*), "it has been urged that the statute of

the United States authorizes resistance by our merchantmen to French visitation and search, to which there is the simple answer that no single state can change the law of nations by its municipal regulations."

The contention of claimants' counsel with reference to the rights guaranteed to American merchantmen under and by virtue of the provisions of the act of 1798 is fully answered by the decision of this court in the above case. If, therefore, at the time of this seizure there was any conflict between the municipal law of the United States, as exemplified in the statute, and the well-recognized principles of international law, the latter must prevail in the determination of the rights of the parties.

By the provisions of the act giving this court jurisdiction to ascertain the claims of American citizens for spoliations committed by the French prior to the 31st of July, 1801, it is, in substance, provided that the validity of said claims shall be determined according to the rules of law, municipal and international, and the treaties of the United States applicable to the same. In order to perform the duties consistent with the requirements of the statute, the court must give each department of the law full recognition and force when properly applicable to the facts and circumstances of the controversy involved in the litigation.

The rights of the claimant are to be measured by the unlawful acts of France, and unless a wrong exist under the rules of international law no liability can attach to the United States; because, by the treaty of 1800, it was only the claims growing out of the wrongful act of France for which the United States had a diplomatic claim and which were assumed to be paid to the citizen whose individual right was violated in that wrong.

This court, in making the investigation contemplated by the act of our jurisdiction, is sitting in the character of an international tribunal, to determine the diplomatic rights of the United States as they existed against France prior to the ratification of the treaty of September 30, 1800.

The municipal law, in the absence of a treaty, must be subordinated to international law when they come in antagonism, as that is the law common to both parties.

Where the question is not exclusively within the domain of international law, then the municipal law may be invoked to determine the proper solution of the question. The rules of property by which the citizens owned the subject-matter of the seizure and condemnation may be properly applied in ascertainment of his rights, and so may many questions of the law of evidence be decided in accordance with the municipal law of the party whose rights have been violated. Congress, in the enactment of the law of our jurisdiction, must be presumed as having recognized many of the principles of municipal law incident to our forms of judicial procedure and determination.

It has been argued that the belligerent, in making the attack on the vessel of the claimant, was not in the exercise of the legal right of search as incident to him as a belligerent; but that it was an assault, the object and purpose of which was the seizure and condemnation, without reference to the fact or condition of being a neutral vessel of the United States engaged in the peaceful and lawful commerce of the sea; that the condition existing between the two governments and peoples was such that all respect of neutral rights had ceased, and that force, fraud, and violence prevailed, and in that connection much is said as to the right of self-defense.

The claimants are treading on very dangerous ground when they urge the higher law of self-preservation. Self-defense is founded on the theory that it is the only remedy, and that being the only remedy, it presupposes the absence of all law protecting the rights of him who asserts the prerogative of self-defense. If the right of self-defense prevailed to the extent of repelling force by force and was incident to the crew of the ship captured, then all other law was silent and war prevailed, which condition would be most disastrous to the case of the claimants.

As we have quoted in another case, decided at the present term of court, from the opinion delivered by Sir William Scott, in the case of the *Maria*, in 1 C. Rob., 340, so we quote upon the subject of the right of self-defense in this case.

"How stands it by the general law? I do not say that cases may not occur in which a ship may be authorized by the natural rights of self-preservation to defend itself against extreme violence threatened by a cruiser grossly abusing his commission; but where the utmost injury threatened is the being carried in for inquiry into the nearest port, subject to a full responsibility in costs and damages, if this is done vexatiously and without just cause, a merchant vessel has not a right to say for itself (and an armed vessel has not a right to say for it), 'I will submit to no such inquiry, but I will take the law into my own hands by force.' What is to be the issue, if each neutral vessel has a right to judge for itself in the first instance whether it is rightly detained, and to act upon that judgment to the extent of using force? Surely nothing but battle and bloodshed, as often as there is anything like an equality of force or an equality of spirit."

For the reasons above stated, the court decides, as a conclusion of law, that the seizure and condemnation were lawful and that the owners and insurers had no valid claim of indemnity therefor upon the French Government prior to the ratification of the convention between the United States and the French Republic concluded on the 30th day of September, 1830, and that the claims were not relinquished to France by the Government of the United States by said treaty in part consideration of the relinquishment of certain national claims of France against the United States, and that the claimants are not entitled to recover from the United States.

The facts in detail, with a copy of this opinion, will be certified to Congress in accordance with the statute.

PRELIMINARY STATEMENT.

These cases were tried before the Court of Claims on the 13th day of March, 1901. The claimants were represented by John Paul Jones, Charles W. Clagett, Edward Lander, I. G. Kimball, Curtis, Pickett & Earle, and John W. Butterfield, esqs., and the United States, defendants, by the Attorney-General, through his assistants in the Department of Justice, Charles W. Russell and John W. Trainer, esqs., with whom was Assistant Attorney-General Louis E. Pradt.

CONCLUSIONS OF FACT.

The court, upon the evidence, and after hearing the arguments and considering the same with the briefs of counsel on each side, determine the facts to be as follows:

I. The ship *Rose*, William Chase, master, sailed on a commercial voyage from Newburyport, Mass., on the 20th of March, 1799, bound for Surinam, and from thence sailed on the 23d day of July, 1799, bound home for Newburyport.

While pursuing said voyage she was captured on the high seas, on the 31st day of July, 1799, by the French cruiser *Conquest of Egypt*, mounting 14 guns and 120 men, after an action of two hours and a half, in which the master of the *Rose* lost his mate and 2 men killed and 14 wounded and the Frenchman had 25 killed and 21 wounded, after which the *Rose* was carried into Guadaloupe, where, on the 18th Thermidor, year 7 (August 6, 1799), said vessel and her cargo were condemned by the tribunal of commerce sitting at Basse Terre, Guadaloupe, under the following decree:

"Judgment and condemnation of the American ship *Rose*, Capt. W. Chase, captured by the privateer *Egypt Conquered*.

"18 Thermidor, 7th year. Extract from the rolls of the royal court of Guadaloupe and its dependencies.

"In the name of the French people.

"The court of commerce and prizes, established on the isle of Guadaloupe, sitting at the Basse-terre of the said isle, at its usual session, on the 18 of the month Thermidor and the 7th year of the French Republic, which is one and indivisible.

"Preamble. In view of information communicated the 14 and 15 of the present month Thermidor, by the justice of peace, stationed at Liberty Port, which information relates to the capture of the American ship *Rose*, of Newburyport, Capt. William Chase, by the privateer called *Egypt Conquered*, Capt. Lyklama. The examination of the papers of the said ship by Citizen Magne, sworn interpreter of the English language, at Liberty Port, which papers, as well as the translation of them, have been lodged in the office. The associate, sworn interpreter of the English language in this city, and Citizen Minard being present at the reading of them. In view of these documents, the president in his report and the overseer of the directory in his suit present the following as the result of their deliberations:

"Considering (according to the above-mentioned documents and information) that it is evident that the capt. of the said ship has neither knowledge nor invoice of his cargo taken at Surinam, which circumstance makes it impossible to know the real owner of the said cargo.

"Considering that his shipping paper (role d'equipage) is not such as is prescribed by the model annexed to the treaty of the 6 February, 1778.

"Considering, finally, that the said captain was bearer of a commission from the President of the United States which authorized him to capture French armed vessels and to carry them into any port of the United States, a commission in virtue of which the captain of the said vessel not only did not obey the summons of the French privateer, but attacked it and defended himself till he was subdued by force of arms. In view of these facts we shall refer to the following articles in justification of our proceedings:

"In the first place the 3rd article of the judgment of the Executive Directory reminds all French citizens that the treaty, passed the 6 February, '78, has been, according to the terms of its 12 article, legally modified by that passed at London the 19 November, 1794, between the United States of America and England. Consequently there is substituted for it the 17 article of the treaty of London, dated 19 November, 1794, which reads as follows: All enemies' merchandise, or that which is not satisfactorily proved neutral, and which is shipped under American colors, shall be confiscated, but the vessel on board of which it shall have been found shall be set at liberty and returned to the owner. In the second place, the 4 article of the same judgment is expressed in these terms:

"In conformity with the law of the 14 February, 1793, the rules and regulations adopted the 21 October, 1744, and the 26 July, 1778, respecting the mode of proving the ownership of vessels and neutral merchandise, shall be executed according to their form and tenor. Consequently every American ship shall be declared a prize which shall not have on board a shipping paper in good form, such as is prescribed by the model annexed to the treaty of the 6 February, 1778, and the execution of which is ordered by the 25 and 27 article of the same treaty. In the 3 place, the 12 article of the 9 record of prizes, contained in the statutes of the month of August, 1681, runs thus: Every vessel which shall refuse to strike its colours after the summons made by our vessels to those of our subjects armed for war shall be obliged to do it by means of artillery or otherwise, and in case of resistance and contest shall be declared a prize. The court authorizing the suit of the Executive Directory declares a prize the said American ship *Rose*, her apparel and cargo, and orders the sale of them, in the customary forms, for the benefit of the captors, and those who armed and were interested in the privateer *Egypt Conquered*, an inventory being previously made of the whole, in presence of the constituted authorities. Made and executed at the court in its said sitting, at which were present Citizens Anthony John Bonnet, president, Anthony Cloder and Gabriel Capoul, judges, and Lewis Christopher, Blin Herminier, registers, the said day, month, and year.

"Signed at the registry.

"BONNET, *President*, and
"BLIN HERMINIER, *Register*."

II. The ship *Rose* was a duly registered vessel of the United States of $250\frac{86}{95}$ tons burthen, was built at Amesbury, Mass., in the year 1797, and was owned by William Bartlett, a citizen of the United States.

III. The cargo of the *Rose* consisted of coffee, cotton, cocoa, and sugar, and was principally owned by William Bartlett, the owner of the vessel. William Chase and Edmund Bartlett, citizens of the United States, owned small portions of the cargo, and Samuel Hopkinson, Enoch Hale, jr., Smith Adams, and Abel Hale had adventures on board said vessel.

IV. The losses by reason of the capture and condemnation of the *Rose*, so far as claims have been filed in this court, were as follows:

The value of the vessel	$10,640.00
The freight earnings for the voyage	4,173.00
The value of the cargo owned by William Bartlett	66,336.98
The value of the carge owned by William Chase	4,959.54
The value of the cargo owned by Edmund Bartlett	3,820.00
The premium of insurance paid by Edmund Bartlett	200.00
Amounting in all to	90,129.52

SPECIAL FINDINGS RELATING TO THE SEVERAL CASES.

V. Case No. 120. William Bartlett was the sole owner of the vessel and a part of the cargo, upon which it does not appear that there was any insurance.

His losses were as follows:

The value of the vessel	$10,640.00
The freight earnings for the voyage	4,173.00
The value of the cargo owned by him	66,336.98
Amounting in all to	81,149.98

VI. Case No. 1056. William Chase was the owner of a portion of the cargo, upon which there does not appear to have been any insurance.

His loss was as follows:

The value of his portion of the cargo	$4,959.54

VII. Case No. 2720. Edmund Bartlett was the owner of a part of the cargo. He insured his portion of the cargo on the 6th day of June, 1799, in the office of John Pearson, in the sum of $2,500, paying therefor a premium amounting to $200.

Thereafter the said John Pearson, as agent for the underwriters, paid to the said Edmund Bartlett the sum of $2,500 as and for a total loss.

His losses were as follows:

The value of his portion of the cargo		$3,820
The premium of insurance paid		200
Total		4,020
Less insurance received	$2,500	
Less two boxes hats sold	120	
		2,620
Leaving a net loss to Edmund Bartlett of		1,400

VIII. Case No. 4318. John Wells, James Prince, and Zebedee Cook, all of whom were citizens of the United States, and others who have not appeared in this court, as underwriters in the office of John Pearson, insured Edmund Bartlett on the 6th of June, 1799, on his portion of the cargo in the sum of $2,500.

Thereafter the said John Pearson paid for said underwriters to said Edmund Bartlett the sum of $2,500, as and for a total loss.

The underwriters on said policy who have appeared in this court by their legal representatives, and the loss sustained by each is as follows:

John Wells	$300
James Prince	500
Zebedee Cook	200

IX. Case No. 4320. Edmund Kimball and Zebedee Cook, citizens of the United States, as underwriters in the office of John Pearson, on the 18th day March, 1799, insured Smith Adams and Abel Hale on their adventure in the sum of $350.

Thereafter the said John Pearson, as agent for the said underwriters, paid, on the 18th of January, 1800, to the said Smith Adams and Abel Hale the sum of $350 as and for a total loss. It does not appear that the said Adams and Hale were citizens of the United States. The underwriters upon said policy have appeared in this case by their legal representatives, and the loss sustained by each is as follows:

Edmund Kimball	$175
Zebedee Cook	175

X. Case No. 4351. John Pearson, a citizen of the United States, as an underwriter in his own office, on the 20th of January, 1799, insured Samuel Hopkinson and Enoch Hale, jr., on their adventure in the sum of $100.

Thereafter the said John Pearson, on the 28th of January, 1800, paid to the said Samuel Hopkinson and Enoch Hale, jr., the sum of $100 as and for a total loss. It does not appear that said Hopkinson and Hale were citizens of the United States.

The underwriter upon said policy has appeared in this case by his legal representative, and the loss sustained by him is as follows:

John Pearson	$100

XI. The claimants have produced letters of administration upon the estate represented by them and have proved to the satisfaction of the court that the persons whose estates they represent are the same persons who suffered loss through the capture and condemnation of the *Rose*.

Said claims were not embraced in the convention between the United States and the Republic of France concluded on the 30th of April, 1803. They were not claims growing out of the acts of France allowed and paid in whole or in part under the provisions of the treaty between the United States and Spain concluded on the 22d day of February, 1819, and were not allowed in whole or in part under the provisions of the treaty between the United States and France of the 4th of July, 1831.

The claimants in their representative capacity are the owners of said claims, which have never been assigned; nor does it appear that any of said claims are owned by an insurance company.

CONCLUSIONS OF LAW.

The court decides, as a conclusion of law, that said seizure and condemnation were not illegal, and the owners and insurers are not entitled to indemnity from the United States, and that the claims of Amos Pearson and John Whalen are not proven.

BY THE COURT.

Filed April 22, 1901.
A true copy.
Test this 30th day of December, 1901.
[SEAL.]

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

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